ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of	)	CC Docket No. 96-187
Section 402(b)(1)(A) of the	)	
Telecommunications Act of 1996	)	
	)	

COMMENTS OF AT&T CORP.

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SUMMARY

For more than a century, businesses designated as "common carriers" have been subject to tariffing regimes. Over that period an extensive body of law and practice has developed to guide agencies and courts in interpreting and regulating carriers' rates and other practices. When Congress enacted Section 402(b)(1)(A) of the Telecommunications Act of 1996 ("1996 Act"), it amended one subsection of a complex tariffing scheme, the interpretation of which was well-settled even before the passage of the original Communications Act in 1934. Accordingly, the Commission must interpret the tariff streamlining provisions of the 1996 Act in the context of longstanding case law and regulatory practice. Congress is presumed to have known and understood this body of precedent when it enacted § 402(b)(1)(A), and the Commission should not assume that the legislature intended to make substantial changes to the existing tariffing regime unless the 1996 Act contains clear language to that effect.

Section 402(b)(1)(A) leaves the Commission's authority over LEC tariff filings unchanged in most respects. The Commission retains its authority to defer tariff filings that are subject to that section for up to 120 days. Section 402(b)(1)(A) simply sets a time limit on the Commission's deliberations over whether to <u>suspend</u> a tariff filing. For those filings covered by that section, if the Commission does not initiate a hearing in 7 or 15 days, or act to defer their effectiveness, then it must allow the tariffs to take effect; although it may convene a hearing at a later date and assess damages as appropriate based upon its findings.

Section 402(b)(1)(A)'s provision that certain LEC tariffs are to be "deemed lawful" cannot reasonably be interpreted to insulate LECs from potential liability for damages for charges that are unjust or unreasonable. Such a reading of that section would not only be patently inequitable, it would also require the Commission to conclude that the 1996 Act turned the notion of tariffing completely on its head by exempting ILEC monopolists from liability for damages for unreasonable charges, while continuing to regulate participants in competitive markets. As the Commission suggests in its NPRM, tariffs that are "deemed lawful" per § 402(b)(1)(A) simply enjoy a presumption of lawfulness during pre-effectiveness review that is analogous to that accorded to tariff filings by nondominant carriers under Section 1.773 of the Commission's regulations.

Section 402(b)(1)(A) does not eliminate the Commission's authority to conduct pre-effectiveness reviews of LEC tariff filings. The Commission should, however, modify certain of its procedures to facilitate its review pursuant to that section's short timetables. To this end, AT&T supports the NPRM's proposals to establish electronic tariff filing and electronic mail notice procedures, but the Commission must retain control over electronic-form tariffs to prevent potential abuses. The Commission also should modify its proposed filing deadlines for petitions seeking suspension of LEC tariffs filed pursuant to § 402(b)(1)(A) so as to permit interested parties an adequate opportunity to review these filings.

AT&T strongly supports the NPRM's proposal to require LECs to file their tariff review plan ("TRP") materials and cost support data in advance of their annual access tariff filings. The Commission should retain its current timetable, which requires

LECs to file these materials 90 days prior to the effective date of their annual access tariffs. Separating the evaluation of TRP and cost support data from rate-setting is clearly in the public interest, because neither the Commission staff nor potential petitioners will have an adequate opportunity to review these voluminous materials in only 7 or 15 days. This 90-day advance filing requirement should apply equally to both price cap and rate-of-return LECs.

Finally, AT&T believes that the logic that supports the Commission's proposal to require TRPs and cost support data to be filed in advance of annual access tariff filings applies with equal force to mid-term LEC tariff filings that propose changes to any price cap indices. Such changes, like annual access tariff filings, require the Commission and petitioners to undertake careful analyses of price cap indices, exogenous costs, and other supporting information. These reviews cannot be adequately conducted in the abbreviated time frames provided by § 402(b)(1)(A). Accordingly, the Commission should require LECs to file TRPs and cost support data at least 30 days in advance of such mid-term tariff filings.

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Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996	)	CC Docket No. 96-187

AT&T COMMENTS

Pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, and its NPRM released September 6, 1996,[1] AT&T Corp. ("AT&T") submits these comments concerning implementation of the LEC tariff streamlining provisions of Section 402(b)(1)(A) of the Telecommunications Act of 1996 ("1996 Act").

ARGUMENT

I. SECTION § 402(b)(1)(A) DOES NOT AFFECT THE COMMISSION'S AUTHORITY TO DEFER LEC TARIFF FILINGS FOR UP TO 120 DAYS

The NPRM suggests that Congress may have intended § 402(b)(1)(A) to foreclose the Commission's exercise of its longstanding general authority under

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1 Notice of Proposed Rulemaking, Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, CC Docket No. 96-187, FCC 96-397, released Sept. 6, 1996 ("NPRM").

§ 203(b)(2) to defer tariff filings for up to 120 days.[2] To the contrary, the Commission's deferral authority has not been limited or altered in any way by § 402(b)(1)(A).[3]

First, although Congress was well aware of the Commission's longstanding power to defer tariff filings under § 203, it did not amend that section in the 1996 Act. Indeed, § 402(b)(1)(A) is completely silent on the issue of deferring LEC tariffs. The plain language of section 203(b)(1) states, as it did before the passage of the 1996 Act, that "no change shall be made in the charges, classifications, regulations, or practices" subject to tariffing requirements, "except after one hundred and twenty days notice." The section goes on to provide that the Commission may shorten the 120-day deferral period, but the statutory command is otherwise absolute and unqualified.

Section 402(b)(1)(A) amends only the section of the Communications Act of 1934 that concerns the Commission's power to suspend tariffs pending a hearing. Thus, the logical interpretation of § 402(b)(1)(A) is simply as a time limit on the Commission's deliberations over whether to suspend a tariff filing. For a filing covered by § 402(b)(1)(A), if the Commission does not act to initiate a hearing in 7 or 15 days, or act to defer its effectiveness, then it must allow the tariff in question to take effect; although, as is discussed below, it may convene a hearing at a later date and assess damages as appropriate based upon its findings.

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2 NPRM, ¶ 6.

3 See id., ¶ 13 (discussing Commission's alternative interpretation of § 402(b)(1)(A), which would leave its deferral authority intact).

There is simply no basis to assume that Congress intended to affect the Commission's deferral authority in any way by enacting a subsection to a provision regulating tariff suspensions. Indeed, the Commission's power to defer tariff filings is elaborated in an entirely separate section of its enabling statute. It would be plainly unreasonable to conclude that Congress accomplished the repeal of a decades-old Commission power by implication from § 402(b)(1)(A)'s silence as to deferrals.

Moreover, it is beyond cavil that Congress did not limit the Commission's power to defer tariffs other than those covered by § 402(b)(1)(A). Therefore, in order to conclude that § 402(b)(1)(A) forecloses its deferral authority, the Commission must presume that Congress sought to exempt only one category of telecommunications providers -- incumbent LECs -- from the more detailed scrutiny of tariff filings that deferral is intended to permit. However, it would be wholly unreasonable to assume that the 1996 Act sought to insulate ILEC monopolists from tariff review. Incumbent LECs are the only participants in today's telephony markets that possess market power -- that is, the ability to raise prices above competitive levels.[4] The primary rationale for tariffing regimes from their inception in the 1870s has been to regulate pricing and other practices by firms that possess a monopoly over vital services.[5] It would be illogical to conclude

4 The Commission clearly is correct when it concludes, as it has since the early 1980s, that incumbent LECs ("ILECs") should not be deemed "small businesses" because their monopoly control over an essential telecommunications "bottleneck" renders them "dominant in their field of operation." See NPRM, ¶ 41.

5 As the NPRM recognized, the Interstate Commerce Act of 1877 was the model for the tariffing provisions of the Communications Act, and courts interpreting the

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that Congress intended § 402(b)(1)(A) to foreclose the Commission's ability to defer only tariff filings by monopolists, while leaving its deferral power in place for tariffs filed by participants in competitive markets.[6]

II. TARIFFS THAT ARE "DEEMED LAWFUL" UNDER § 402(b)(1)(A) ARE NOT THEREBY INSULATED AGAINST CLAIMS FOR DAMAGES PURSUANT TO §§ 206 & 207

The NPRM offers two possible interpretations of § 402(b)(1)(A)'s provision that certain LEC tariff filings "shall be deemed lawful."[7] The first of these suggests that the subsection works a radical change in the law that has long governed tariffing by permitting ILEC monopolists to collect, without liability for damages, any rate that they file, no matter how unjust or unreasonable, unless the Commission suspends that rate within either 7 or 15 days. The Commission's second interpretation concludes that

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Communications Act have long looked to the jurisprudence of that earlier statute for guidance. See, e.g., MCI v. AT&T, 114 S. Ct. 2223, 2231 (1994).

6 AT&T strongly supports the NPRM's conclusion that § 402(b)(1)(A) applies only to incumbent LECs. See NPRM, ¶¶ 41-42. For years, the Commission's regulations have permitted non-dominant domestic carriers to make tariff filings on as little as one-day's notice, 47 C.F.R. § 61.23(c), because these carriers lack market power and their pricing therefore is disciplined by competitive forces. It would not be reasonable to conclude that Congress, as an element of its effort to stimulate competition in the 1996 Act, actually sought to increase the required notice periods for non-dominant carriers' tariff filings to 7 or 15 days. It is even more implausible to contend that Congress would refer to such a measure as permitting non-dominant LECs to file "on a streamlined basis." As the Commission indicates, its rules implementing § 402(b)(1)(A) will apply only to incumbent LECs, and to ILECs' affiliates, successors or assigns. See 47 U.S.C. § 251(h).

7 See NPRM, ¶¶ 9-15.

§ 402(b)(1)(A) establishes a presumption during pre-effectiveness review that the relevant tariffs are lawful, but continues to impose upon carriers potential liability for damages under §§ 206 and 207, unless and until the tariff in question is affirmed by the Commission after a hearing. This second reading is the only reasonable interpretation of § 402(b)(1)(A).

The Communications Act of 1934, like other tariffing statutes extending back more than one hundred years,[8] requires carriers to file tariffs with the Commission specifying the price and other terms under which they will provide service. These tariffed rates are the "legal rates; that is, those that must be charged to all shippers alike."[9] A common carrier's customers are required by law to pay that carrier's filed rate, but if they can demonstrate through the hearing process that the tariffed rate is unreasonable, they then can collect damages from that carrier after the fact to recover any amounts paid over and above the reasonable rate.[10] If, however, the Commission makes an affirmative finding that the rate is reasonable, then it becomes the "lawful" rate, and the customer may not seek reparations for overcharges. The Commission refusal to suspend a rate before it takes effect does not amount to a finding that it is reasonable. Accordingly, a customer may obtain damages even after the Commission elects not to issue a suspension, and the

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8 See Maislin Indus. v. Primary Steel, Inc., 497 U.S. 116, 130 (1990).

9 Arizona Grocery Co. v. Atchison, T. & S.F. Ry., 284 U.S. 370, 384 (1932).

10 See 47 U.S.C. §§ 207, 208. The Commission is also empowered to prescribe "just and reasonable" rates if it finds, after a hearing, that a carrier's rates are unreasonable. Id. § 205.

Commission may order a carrier to keep an accounting of all funds received under a tariff that it allows to take effect, in order to facilitate possible future awards of damages.[11] In the Supreme Court's classic formulation, "the legal rate was not made by the statute a lawful rate -- it was lawful only if it was reasonable."[12]

In order to conclude that § 402(b)(1)(A) was intended to bar claims for damages against LECs filing tariffs pursuant to that section, the Commission would have to presume that Congress rewrote more than a century of settled law by inference, via an amendment to a subsection of the Communications Act of 1934 addressing not damages awards, but the Commission's power to suspend tariff filings. Further, this view of § 402(b)(1)(A) would require the Commission to conclude that the 1996 Act turned the notion of tariffing completely on its head by exempting ILEC monopolists from liability for damages for unreasonable charges, while continuing to regulate participants in competitive markets.

The only reasonable interpretation of "deemed lawful," as that phrase is used in § 402(b)(1)(A), is the NPRM's suggestion that it serves to establish a higher burden for pre-effectiveness suspension of a tariff filing.[13] The 1996 Act did not amend in

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11 Id. § 204(a)(1).

12 Arizona Grocery, 284 U.S. at 384; Maislin, 497 U.S. at 128.

13 See NPRM, ¶ 12. Dictionary definitions of the verb "deem" are unfortunately of no real assistance in interpreting § 402(b)(1)(A). Black's Law Dictionary defines the term to mean both a conditional presumption ("consider," "believe," "treat as if"), and a more definite determination ("to hold," "adjudge," "determine").

any way those portions of the Communications Act authorizing the Commission to hold hearings as to the reasonableness of tariffs on its own motion or on complaint, or customers' right to obtain, and carriers' liability for, damages. In addition, to exempt ILECs from liability for damages after only the briefest review of their filings would be shockingly inequitable. Under such a reading of § 402(b)(1)(A), if a tariff was found after its effective date to have been based on intentionally falsified data, the guilty carrier would be entitled to retain all of the profits it earned from that filing up to the date the Commission issued a decision finding the tariff unreasonable.

There is simply no reason to permit a carrier to benefit from unjust or unreasonable rates -- indeed, to do so would create a powerful perverse incentive for LEC tariff writers to make "errors" in the LECs' own favor. Further, it is patently unreasonable to assert that the 1996 Act would have extended this bizarre largesse only to incumbent LECs, the sole entities in today's telecommunications markets with the ability to sustain prices that are set above competitive levels. If Congress intended to make tariff filings absolutely immutable after 7 or 15 days, it plainly would not do so only for those entities with market power. In the absence of a clear congressional statement to the contrary, this topsy-turvy version of "regulatory reform" is presumptively unreasonable.

The Commission should adopt the alternative interpretation of § 402(b)(1)(A)'s "deemed lawful" provision which is suggested in paragraph 12 of the NPRM. The "deemed lawful" provision's function is to establish a presumption of lawfulness for the relevant tariffs during pre-effectiveness review. This presumption is, as the NPRM suggests, analogous to that accorded to LEC rate filings that are within applicable price cap limits, or to filings by non-dominant carriers under Section 1.773 of the Commission's rules.[14]

Thus, tariffs filed pursuant to § 402(b)(1)(A) should not be suspended unless a petitioner makes a showing similar to the four-part test required under 47 C.F.R. § 1.773. However, because ILECs retain significant market power and thus present a greater potential threat to impose unreasonable rates, petitioners challenging a tariff filed pursuant to § 402(b)(1)(A) should be required to show only that it is "more likely than not" that the disputed tariff is unlawful, rather than "a high probability" that the tariff will be found unlawful.[15] As the NPRM tentatively concludes, the 1996 Act otherwise "leaves in place the statutory scheme governing interstate common carrier filings."[16] The Commission retains its power to entertain complaints under § 208 and to award damages pursuant to §§ 206 and 207, as well as to defer or reject tariff filings, as provided in §§ 203 and 201.

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14 NPRM, ¶ 12 (citing Policy and Rules Concerning Rates for Dominant Carriers, 6 FCC Rcd. 2637, 2643 (1991) and 17 C.F.R. § 1.773).

15 47 C.F.R. § 1.773(a)(ii)(A) requires petitioners challenging tariffs filed by nondominant carriers to show (i) that there is "a high probability that the tariff would be found unlawful after investigation"; (ii) that the harm alleged to competition would be greater than the harm to the public arising from suspension of the filing; (iii) that irreparable injury will result if the tariff is not suspended; and (iv) that the suspension is not otherwise contrary to the public interest. Applying the "high probability" of unlawfulness criterion to LECs that retain substantial market power is clearly inconsistent with the factual premise of the § 1.773 test.

16 NPRM, ¶ 13.

III. SECTION 402(B)(1)(A) SPECIFIES 7 AND 15-DAY "STREAMLINED" FILING ONLY FOR LEC TARIFF FILINGS SEEKING TO INCREASE OR DECREASE RATES FOR EXISTING SERVICES

The Commission should modify and clarify its proposals defining the LEC tariffs that are eligible for filing on a "streamlined" basis. First, AT&T supports the NPRM's conclusion that § 402(b)(1)(A) applies only to "charges, classifications, regulations, or practices" for existing LEC services.[17] As the NPRM states, the Commission has in the past treated filings pertaining to new services differently than those for existing services; and both the Commission and commenters often will require a fuller opportunity to review tariff filings for new services than might be permitted by streamlined procedures.[18]

AT&T believes that the Commission should clarify its tentative conclusion that "all LEC tariff filings that involve changes to the rates, terms, and conditions of existing service offerings are eligible for streamlined treatment."[19] The plain language of § 402(b)(1)(A) specifies particular time periods in which the Commission must determine whether to suspend a tariff filing in only two cases: increases or decreases in rates for existing services. The Commission must act within 7 days either to defer or suspend a tariff filing seeking a decrease in rates, or else permit that filing to take effect. A similar

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17 Id., ¶ 18.

18 Id. The Commission's ability to defer filings for up to 120 days pursuant to § 203 also will continue to afford an opportunity for more detailed review of tariff filings when the Commission deems such action appropriate.

19 Id., ¶ 17.

analysis applies to filings seeking an increase in rates, but the Commission has 15 days to suspend or defer such tariffs.[20] Section 402(b)(1)(A) is silent, however, as to the appropriate time periods for consideration of suspension or deferral in the case of changes to a "classification, regulation, or practice" concerning an existing service. Although Congress did instruct the Commission to "streamline" its review of the specified LEC tariff filings, § 402(b)(1)(A) leaves to the Commission's expert discretion the particular time periods appropriate for its review of filings that seek to make changes, other than rate increases or decreases, to the terms and conditions pertaining to existing services. For such tariff filings, AT&T proposes that the Commission require that LECs file 30 days prior to a tariff's proposed effective date.[21]

[20] AT&T supports the NPRM's proposal to apply a 15-day period for Commission action on suspension or deferral in cases in which a LEC tariff contains both rate increases and decreases. See NPRM, ¶ 26.

[21] The NPRM also seeks comment on whether the Commission may exercise its forbearance authority under Section 10(a) of the 1996 Act to establish mandatory or permissive detariffing of LEC tariffs filed pursuant to § 402(b)(1)(A). See NPRM, ¶ 19. Nothing in § 402(b)(1)(A) suggests that LEC tariffs subject to streamlining are outside the scope of the Commission's powers under § 10. However, as AT&T has demonstrated in other proceedings, even if some form of detariffing were consistent with the public interest -- which it is not -- the FCC has no authority under the 1996 Act to order mandatory detariffing and thereby prohibit carriers from filing tariffs. See, e.g., AT&T Comments, filed April 25, 1996, p. 10, in Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61, Notice of Proposed Rule Making, FCC 96-123, released March 25, 1996.

IV. THE COMMISSION RETAINS ITS AUTHORITY TO CONDUCT PRE-EFFECTIVENESS REVIEWS OF LEC TARIFF FILINGS, AND SHOULD MODIFY CERTAIN OF ITS PROCEDURES TO FACILITATE REVIEW OF TARIFFS FILED PURSUANT TO § 402(B)(1)(A)

The NPRM seeks comment on whether the Commission should abandon pre-effectiveness review of LEC tariffs filed pursuant to § 402(b)(1)(A), or should instead modify its procedures to make continued pre-effectiveness reviews possible.[22] AT&T shows below that Congress did not intend to eliminate pre-effectiveness review of LEC tariffs simply by streamlining the process by which the Commission decides whether to suspend a tariff filing.

To eliminate pre-effectiveness review would permit ILEC monopolists unilaterally to impose rates and terms until such time as the Commission could conclude an investigation. This fact would, by itself, render such a policy unreasonable in the absence of clear congressional instruction to the contrary. Such a policy would also make a nullity of § 204(a), which authorizes the Commission to conduct a pre-effectiveness investigation "upon complaint" or on its own initiative "whenever there is filed any new or revised charge, classification, regulation, or practice." The Commission's powers under § 204(a) attach when a tariff is filed, not after it takes effect.[23]

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22 NPRM, ¶¶ 22-24.

23 Although AT&T believes that there is no basis for such a conclusion, if the Commission were to adopt its proposal that § 402(b)(1)(A)'s "deemed lawful" provision insulates a LEC from any action for damages until such time as a tariff is adjudged unjust or unreasonable, then relying only on post-effectiveness review would guarantee that a LEC could profit from even the most outrageously unjust tariff until the Commission was able complete a hearing on that filing. The obvious

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At the same time, the relatively short periods provided by § 402(b)(1)(A) do require modification of the pre-effectiveness review process. As AT&T has shown, the Commission retains its authority to defer for up to 120 days those LEC tariff filings that present issues that require more in-depth review than can be conducted in 7 or 15 days. Because § 402(b)(1)(A) permits such a short period in which to consider certain filings, AT&T supports the NPRM's suggestion that the Commission may wish to designate by rule certain categories of tariffs that would be presumptively subject to deferral or suspension, such as those that are facially noncompliant with price cap rules or other Commission regulations.[24] In order to facilitate pre-effectiveness review by both the Commission and potential complainants, AT&T also strongly supports the NPRM's proposal to require that tariff filings under § 402(b)(1)(A) include a detailed description of any changes in the terms and conditions of the tariff and their potential impact on customers, as well as an analysis demonstrating that the tariff is lawful under current Commission rules.[25]

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injustice of such a policy speaks eloquently against any argument that Congress intended that result.

24 See NPRM, ¶ 25.

25 See id.

A. The Commission Should Adopt Electronic Mail Notice Procedures And Electronic Filing, But Must Retain Control Over Electronic-Form LEC Tariffs

The Commission should adopt the NPRM's proposal to maintain a list of interested parties and to provide affirmative notice to them by electronic mail when a LEC tariff is filed pursuant to § 402(b)(1)(A).[26] Electronic mail notice procedures could be established at very low cost, and should be adopted as soon as possible. There is no reason to delay implementation of e-mail notice procedures until electronic tariff filing is available. Even in the absence of electronic filing, providing notice via electronic mail will allow interested parties to make arrangements to obtain copies of the relevant documents more quickly than they otherwise might, which will be essential to meeting the tight deadlines required by § 402(b)(1)(A).

In order to help streamline the tariffing process, the NPRM proposes to create a system of electronic filing for tariffs and supporting materials. AT&T strongly supports the creation of such a system, and applauds the Commission's foresight in seeking to establish it. Electronic-form tariffs should be posted on the World Wide Web on the same day that they are filed with the Commission, and should be in the same format that LECs now use to file supporting materials with their annual filings. Rate information and cost support should be "downloadable" in Lotus spreadsheet form and as ASCII text files, while other documentation should be downloadable as ASCII text. AT&T also supports the Commission's suggestion to permit parties to file petitions and responsive

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[26] See id., ¶ 26.

proceedings electronically. It is essential, however, that any such system include reliable means to provide receipts from the Commission that confirm the date and time a document was filed. Given the compressed time frames provided by § 402(b)(1)(A), no party can afford to make a belated discovery that its electronic filing failed to reach the Commission. The Commission's rules governing electronic-form tariff filings under § 402(b)(1)(A) should also provide that a tariff is not deemed "filed," and the 7- or 15-day period for pre-effectiveness review does not begin to run, until the tariff and its supporting documents are successfully posted on the designated Web site, and thereby made available to the public.[27]

In order to ensure the integrity of electronic-form tariff filings and to make certain that their formats and availability are consistent, it is critical that the Commission, rather than individual LECs, manage and control the server on which those filings are stored. Access to this server must be "read-only" for all parties except the Commission itself. To permit LECs to manage the posting or maintenance of their own electronic-form tariffs would create far too many opportunities for manipulation. For example, if a LEC controlled its own electronically-filed tariff, it would be virtually impossible to detect any modifications made shortly after filing, unless another party happened to download a copy

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27 The Commission should also consider that if its server is unavailable for a period of more than a few hours, parties relying on it to obtain information they will need in order to prepare and file a reply within a matter of days could be placed at a serious disadvantage. To account for this fact, the Commission should consider adopting a policy that would treat periods when its server is down in much the same way that it currently treats the closing of its offices due to inclement weather. See 47 C.F.R. § 1.4(e).

of the document prior to such tampering. Also, whenever a file was corrupted or a server was unavailable, it would be impossible to know whether there had been a genuine technical failure, or simply an effort to prevent potential petitioners from obtaining necessary data in time to review it.

B. Filing Periods For Petitions And Replies Under § 204 Should Be Longer Than Those Proposed In The NPRM

The NPRM's proposed filing periods for petitions against LEC tariffs during pre-effectiveness review should be lengthened to permit interested parties a more meaningful opportunity to review the filings in question and to prepare their case. The NPRM suggests that for LEC tariff filings that are effective within 7 or 15 days of filing, petitions must be filed within 3 days after the date of the tariff filing, and replies 2 days after service of the petition.[28] The Commission has also proposed that these time periods will be based on calendar days, so that weekends and holidays will be included in any computation of time.[29] AT&T urges that the Commission instead allow 3 business days for filing petitions, and 1 calendar day for replies, when a LEC tariff is eligible to take effect after 7 days;[30] and allow 7 calendar days for petitions, and 2 calendar days for replies, when a tariff filing will take effect after 15 days.

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28 NPRM, ¶ 26.

29 Id.

30 Although the Commission proposes to count § 402(b)(1)(A)'s 7-day pre-effectiveness period in terms of calendar days, the timetable AT&T proposes could require the extension of that term in some circumstances, such as to account for an intervening 3-day holiday weekend. However, LECs have complete control over the date on which they choose to make tariff filings, and should therefore not be

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There appears to be no reason to limit petitioners to the same sharply restrictive timetable for both 7 and 15-day filings. At a minimum, the Commission should extend its proposed filing periods for 15-day review cycles. Further, if only 3 calendar days were permitted for petitions, including weekends and holidays, it is easily foreseeable that LECs will make their tariff filings on Friday afternoons, so as to leave petitioners only one business day in which to review a filing, determine if a petition is an appropriate response, and prepare a petition if necessary. Finally, permitting 1 calendar day for replies to petitions against tariffs that are effective in 7 days is reasonable, because LECs will have an opportunity to prepare and state their case at length in the expanded information that the Commission proposes to require them to include with tariffs filed pursuant to § 402(b)(1)(A). Because LECs will have already placed detailed information before the Commission, as well as an analysis demonstrating that their proposed tariffs are legal, they will not be disadvantaged if they are allowed 1 day to prepare their reply to any petitions.

C. The Commission Should Require LECs To File Tariff Review Plan Materials In Advance Of Their Annual Access Tariff Filings And Any Mid-Term Change To Their Price Cap Indices

The NPRM proposes to require LECs to file their tariff review plan ("TRP") materials and cost support data in advance of their annual access tariff filings.[31]

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permitted to complain if the 7-day timetable cannot be met because they elected to file on an inopportune day. The public interest would not be served by enabling LECs' to evade thorough review of their tariffs by exploiting quirks of the calendar.

[31] NPRM, ¶¶ 30-31.

AT&T strongly supports this proposal, and urges the Commission to retain its current timetable, which requires LECs to file these materials 90 days prior to the effective date of their annual access tariffs. As the NPRM concludes, changes to annual access tariffs do appear to involve rate increases or decreases, and so may be filed pursuant to § 402(b)(1)(A). However, nothing in the 1996 Act prevents the Commission from requiring that TRPs and cost support data be filed separately, and in advance of, access tariff filings. TRPs and the other data filed with them consist of voluminous and detailed material concerning proposed price cap indices, exogenous cost adjustments, and other information that helps support, but is distinct from, the tariff filings covered by § 402(b)(1)(A). TRPs and cost support data are used to determine price caps, but the actual rate a LEC later files with the Commission will be set at or below the price cap, pursuant to LEC pricing strategies that are distinct from the calculation of its price cap indices.

The Commission thus may reasonably decide to conduct its review of rate increases and decreases separately from its review of TRPs and cost support data. The Commission also has the power to make the determination that separating the evaluation of TRPs and cost support data from rate-setting is in the public interest, because neither the Commission staff nor potential petitioners will have an adequate opportunity to review these materials in only 7 or 15 days.[32]

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32 See id. ¶ 31.

The NPRM also proposes that LECs subject to rate-of-return regulation should be required to file their TRPs and cost support data only 15 days prior to the effective date of any rate changes proposed in their annual access tariffs.[33] AT&T believes that a 15-day filing period will be woefully inadequate for review of these materials. The volume and complexity of the TRPs and cost support data filed by rate-of-return LECs is no less than that filed by price cap carriers. Moreover, parties that wish to review rate-of-return LECs' filings must undertake the same analyses required to evaluate the annual access filings submitted by price cap LECs. Accordingly, there is no basis to establish different filing schedules based on these categories. Rate-of-return LECs should be required to file their TRPs and cost support data 90 days before the effective date of any rate increases or decreases that will be proposed in their annual access tariffs.

The logic that supports the Commission's proposal to require TRPs and cost support data to be filed in advance of annual access tariff filings applies with equal force to mid-term LEC tariff filings that propose changes to any price cap indices. Such changes, like annual access tariff filings, require the Commission and petitioners to undertake careful analyses of price cap indices, exogenous costs, and other supporting information. These reviews cannot be adequately conducted in 7 or 15 days.

The Commission should require that LECs must provide TRPs and cost support data at least 30 days in advance of any mid-term change to their price cap indices, whether such changes are initiated by a LEC or by the Commission itself. Indeed, if the

33 Id., ¶ 31.

Commission does not institute such a requirement, LECs will have a strong incentive to defer adding exogenous costs until their mid-term filings, which will receive only the abbreviated review that will be possible under a 7- or 15-day timetable.

D. The Commission Should Modify The NPRM's Additional Proposals Concerning Pre-Effectiveness Review Of LEC Tariff Filings

The NPRM makes three additional proposals to change the Commission's procedures for pre-effectiveness review of LEC tariff filings pursuant to § 402(b)(1)(A). First, the Commission seeks comment on whether it may "routinely impose a standard protective order whenever a carrier claims in good faith that information qualifies as confidential under relevant Commission precedent."[34] AT&T believes that the Commission does not have the authority to issue this type of *pro forma* protective order. Nothing in the Freedom of Information Act or in the 1996 Act relieves the Commission of its obligation to determine whether information in its possession may in fact properly be withheld from the public, despite the abbreviated timetable established by § 402(b)(1)(A).

Second, the Commission seeks comment on whether it should establish procedural rules to expedite the hearing process in light of the fact that that § 402(b)(1)(A) now requires that hearings be concluded within 5 months, rather than in up to 15 months as was formerly the case.[35] AT&T believes that at this time the Commission should continue to set procedures governing tariff investigations on a case-by-case basis.

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34 Id., ¶ 29.

35 Id., ¶¶ 32-33.

Such a policy will afford the Commission much-needed flexibility to exercise its judgment as to how best to structure individual cases, and will allow for some essential experimentation as both the Commission and hearing participants adjust to the new deadlines established in the 1996 Act.

Finally, in light of the shortened timetable for hearings provided by the 1996 Act, the NPRM asks whether the Commission may, consistent with 47 U.S.C. § 5(c) (which prohibits the Commission from delegating its functions pursuant to § 204(a)), terminate tariff investigations by *pro forma* order adopting a decisional memorandum by the Common Carrier Bureau.[36] AT&T believes that such a procedure is permissible; however, any such order would be a "final agency action" subject to judicial review under 5 U.S.C. § 704.

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[36] Id., ¶ 33.